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SAPIAH MAHMUD

v.

SUPERINTENDENT OF LANDS AND SURVEYS SAMARAHAN DIVISION & ORS

B

HIGH COURT SABAH & SARAWAK, KUCHING
LINTON ALBERT J
[SUIT NO: 22-82-2003-I]
11 MAY 2009

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LAND LAW: *Customary land - Claim for native customary rights over land - Whether native customary rights over the lands could be transferred to plaintiff for valuable consideration - Whether plaintiff failed to establish native customary rights*

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The plaintiff, a native of Sarawak, claimed to have acquired native customary rights over certain areas comprised in various field lots (the said lands). Her pleaded claim was based on the fact that she had purchased the said lands under several documents from the respective sellers who claimed to be entitled to the said lands as successors of the original occupiers of the said lands. The relief the plaintiff was asking for was a declaration that the plaintiff had acquired native customary rights over the said lands. The issue that arose was whether the native customary rights over the said lands could be transferred to the plaintiff for valuable consideration.

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Held (dismissing plaintiff's claim):

(1) Native customary rights do not owe their existence to statutes. The basis of a claim for native customary rights is their continuous occupation of land. The plaintiff did not claim to be in continuous occupation nor was evidence adduced to show that it was the custom of transferors who were Ibans that native customary rights could be transferred in the way the plaintiff claimed. In the circumstances, the plaintiff failed to establish that she had acquired native customary rights over the said land. (paras 3 & 6)

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Case(s) referred to:

Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai And Another Appeal [2005] 3 CLJ 555 CA ***(refd)***

Sumbang Anak Sekam v. Engkarong Anak Ajah [1958] SCR 95 ***(refd)***

Sat Anak Akum & Anor v. Randong Anak Charereng [1958] SCR 104 ***(refd)***

Galau & Ors v. Penghulu Imang & Ors [1966] 1 LNS 50 CA ***(refd)***

For the plaintiff - See Chee How; M/s Baru Bian Advocates
For the defendants - Saferi Ali, AG's Chambers

Reported by Suhainah Wahiduddin

JUDGMENT

Linton Albert J:

[1] The plaintiff is a native of Sarawak. She claims to have acquired Native Customary Rights over certain areas comprised in various field lots (the said lands) in Sungai Merdang Limau, Samarahan, Kuching. Her pleaded claim is based on the fact that she had purchased the said lands under several documents from the respective sellers who claimed to be entitled to the said lands as successors of the original occupiers or the original occupier to the said lands. In short, the original occupier or successors of the original occupier had acquired Native Customary Rights to the said lands and have sold the said lands to the plaintiff, who in turn, it is contended acquired the Native Customary Rights over the said lands. It is also the plaintiff's pleaded case that the sale of the said lands is permissible under the custom of the erstwhile owners of the said lands under Native Customary Rights who sold their respective field lots to the plaintiff. Additionally the plaintiff pleads that the transactions are permissible under the provisions of the Land Code. The relief the plaintiff is asking for is a declaration that the plaintiff has acquired Native Customary Rights over the said lands. The plaintiff is also asking for various other consequential reliefs.

[2] In the circumstances set out in the plaintiff's pleaded case, the plaintiff's claim can be determined by considering the legal effect of the purchase of the said lands by the plaintiff. It is unnecessary, therefore, to determine whether the sellers of the said lands had established their Native Customary Rights over the said lands in accordance with the provisions of the Land Code.

A Simply put, the sole question is whether the Native Customary Rights over the said lands can be transferred to the plaintiff for valuable consideration.

[3] It is a well established principle that Native Customary B Rights do not owe their existence to statutes and that the basis of a claim for Native Customary Rights is their continuous occupation of land: (See *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai And Another Appeal* [2005] 3 CLJ 555 CA). The plaintiff does not claim to be in continuous occupation nor is C evidence adduced to show that it is the custom of the transferors who are Ibans that Native Customary Rights can be transferred in the way the plaintiff claims. In fact there are authorities which are inconsistent with the plaintiff's claims to have acquired Native Customary Rights over the said lands. In *Sumbang Anak Sekam v.* D *Engkarong Anak Ajah* [1958] SCR 95 Lascelles, J laid down the following principle at p. 96:

> Individual customary rights are not transferable by sale or otherwise for value.

E **[4]** Even the Iban custom of 'tungkus asi' which is the giving of a customary token in exchange for Native Customary Rights over land has its limits. Lascelles, J at p. 97 said:

> The term 'Tungkus Asi' may now well be misused and disguise F what is really in fact a sale. If for example the 'tungkus asi' was to consist of, say $500.00 cash or a $1,000.00 outboard engine then this would be a sale and invalid.

[5] The consideration given by the plaintiff for the said lands was many times the figures used for illustration. *Sat Anak Akum* G *& Anor v. Randong Anak Charereng* [1958] SCR 104 and *Galau & Ors v. Penghulu Imang & Ors* [1966] 1 LNS 50 CA are also authorities for the proposition that Native Customary Rights over land cannot be transferred for value.

H **[6]** In the circumstances the plaintiff has failed to establish that she has acquired Native Customary Rights over the said land. The plaintiff's claim is accordingly dismissed with costs to be taxed unless agreed.

[7] Order accordingly. I